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In the Supreme Court of the United States

OCTOBER TERM, 1992

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the nonstatutory labor exemption to the antitrust laws protects an anticompetitive agreement entered into by horizontal competitors outside of the context of collective bargaining or negotiations with employees.

2. Whether petitioners' agreement to limit and standardize retail hours at their automobile dealerships constitutes an unfair method of competition prohibited by Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

3. Whether the Federal Trade Commission's remedial order bears a reasonable relationship to petitioners' violation of Section 5 and constitutes a permissible exercise of the Commission's discretion.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-49a, is reported at 955 F.2d 457. The opinion and order of the Federal Trade Commission (Commission), Pet. App. 50a-117a, and the initial decision of the administrative law judge, Pet. App. 118a-201a, are reported at 111 F.T.C. 417.

JURISDICTION

The judgment of the court of appeals, Pet. App. 204a-205a, was entered on March 4, 1992. The petitions for rehearing were denied on May 22, 1992. Pet. App. 202a-203a. The petition for a writ of certiorari

was filed on August 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are more than ninety automobile dealerships engaged in the retail sale of automobiles in the Detroit, Michigan, metropolitan area; eighteen trade associations; more than seventy individual principal owners or operators of the dealerships; and one trade association executive (collectively, the dealers). Pet. App. 2a-3a. In 1959, most Detroit automobile dealerships were open weekday nights as well as Saturdays.[1] Pet. App. 3a-4a. In that year, the Teamsters Union began an organizational campaign and, by 1960, two rival unions were seeking to organize employees of the dealerships. Among other things, the unions demanded multiemployer bargaining and uniform and shorter hours for salespersons. Petitioners did not engage in bargaining. Instead, petitioners agreed among themselves to reduce their dealerships' showroom hours by closing at 6:00 p.m. on Wednesday, Friday, and Saturday evenings.[2] *Id.* at 59a, 122a-123a. After the night closings were implemented, the unions lost their organizational efforts. *Id.* at 4a, 59a. By 1966, the dealers had further agreed

[1] A Michigan "blue law" enacted in 1953 prohibits dealerships from selling cars on Sundays. Pet. App. 122a.

[2] The dealers arrived at the agreement to implement night closings and to resist unionization at meetings of petitioner Detroit Automobile Dealers Association (DADA) and at meetings of dealer line group associations. Pet. App. 4a & n.2. DADA widely publicized and advertised the showroom closing hours, and lobbied dealers to comply with them. *Id.* at 122a-124a.

among themselves to close on Tuesday evenings. *Id.* at 54a-55a, 59a.[3]

In the late 1960s, another union mounted a drive to organize the dealers' employees. A number of strikes were called, and many involved violence, threats, and vandalism. The organizing effort failed to obtain multiemployer bargaining, but did result in the negotiation and ratification of a few individual collective bargaining agreements with particular dealers. Although union negotiators had sought Saturday closings, the agreements did not provide for such closings. Instead, the agreements generally gave management the right to determine business hours. Pet. App. 59a-60a.

During the 1970s, the Teamsters made a renewed effort to organize some of the dealers' employees. One issue used to recruit employees was a demand for Saturday closings. The Teamsters failed to obtain multiemployer bargaining or collectively bargained Saturday closings. Pet. App. 5a, 60a-61a. By 1973, however, petitioners had agreed among themselves to implement Saturday closings as a way to achieve labor stability and to thwart unionization. *Id.* at 4a, 61a. As a result, since 1973 almost all of the new-car dealerships in Detroit remain open only two evenings each week. Detroit is the only metropolitan area in the United States in which dealerships are closed on Saturdays. *Id.* at 5a, 56a, 130a.

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[3] DADA explained to one dealer that the practice of closing three evenings each week had not only pleased employees, but had also "proven popular * * * with the dealers" because it "improved their grosses" by virtue of "the fact that with fewer shopping hours, the public can devote less time to shopping, and consequently forcing down prices." Pet. App. 80a, 131a-132a.

2. In 1984, the Commission issued an administrative complaint charging that the dealers' agreement to close showrooms on Tuesday, Wednesday, and Friday evenings and all day on Saturday constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Pet. App. 50a. After a lengthy hearing, the administrative law judge (ALJ) dismissed the complaint. The ALJ concluded that the dealers' agreements had been reached as a result of a labor dispute growing out of demands by employees and unions for a shorter, uniform work week. The ALJ further concluded that any injury to competition resulting from the dealers' agreement was not only remote and indirect, but was justified by the labor peace the agreement produced. Relying on *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), the ALJ concluded that the agreement was immunized under the nonstatutory labor exemption to the antitrust laws. Pet. App. 51a, 178a-201a.

The Commission reversed. Pet. App. 50a-111a. First, the Commission determined that the nonstatutory labor exemption is not available to petitioners. The Commission explained that the purpose of that exemption is to protect and facilitate the collective bargaining and negotiating process. Here, the Commission found that the dealers' agreement to limit showroom hours was not part of a process of labor negotiations, but was designed to frustrate collective negotiations. The Commission also rejected petitioners' effort to portray their agreement as the result of union pressure that was tantamount to negotiations, stating that there is no evidence that the dealers' agreement emerged from arm's length bargaining. It further concluded that the few individual collective bargaining agreements reached with

particular dealers did not establish shorter working hours, but merely incorporated pre-existing hours established by the dealers' agreement.[4] *Id.* at 61a-74a.

Second, applying the analysis it developed in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549, 604 (1988), the Commission concluded that the dealers' agreement violated Section 5. Pet. App. 74a-87a. It noted that the reduction in hours amounted to a restriction on output, because consumers who are shopping for automobiles will consider not only price, but also "whether the [dealer] provides hours that are convenient to the consumer's schedule." *Id.* at 77a. The Commission also observed that petitioners "expected the hours restriction to benefit them by limiting comparison shopping" and thereby suppressing price competition. *Id.* at 80a. Because the dealers' horizontal agreement tended to restrict competition and was not supported by any plausible justification grounded in efficiency, the Commission found that it violated Section 5.[5] *Id.* at 83a.

[4] The Commission distinguished this Court's decision in *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, *supra*, by noting that in that case, the restriction on marketing hours was contained in a collective bargaining agreement that resulted from "bona fide, arm's-length bargaining." Pet. App. 71a. Here, in contrast, only employers are party to the dealers' agreement and it did not result from labor negotiations. *Ibid.*

[5] The Commission rejected petitioners' claim that no violation of Section 5 could be established absent a showing that car prices in Detroit went up as a consequence of the dealers' agreement. Pet. App. 84a. The Commission explained, *id.* at 85a, that this Court had rejected a similar argument in *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 461-462 (1986). Moreover, the Commission noted that even if prices did not go

To remedy the violation, the Commission ordered, among other things, that dealers open their showrooms a minimum of 64 hours per week for one year; that dealers refrain from discussing showroom hours among themselves, except when necessary to comply with the Commission's order; and that the associations of dealers enforce that prohibition by keeping transcripts of business meetings for five years, and by investigating alleged violations and expelling, within 30 days, any member who violates the ban on discussion of showroom hours. Pet. App. 92a-104a.

3. The court of appeals generally affirmed the Commission's order, but remanded for further consideration of certain issues. Pet. App. 1a-33a. The court agreed with the Commission's conclusion that the nonstatutory labor exemption does not shield the dealers' agreement from antitrust scrutiny. While noting that the dealers reached their agreement partially in response to union pressure (including violence and threats) to shorten working hours, the court concluded that the agreement itself—which was between dealers, not dealers and employees—did not result from collective bargaining or arm's length negotiations with employees, and was therefore not entitled to antitrust immunity.[6] *Id.* at 19a-21a.

The court differed from the Commission, however, as to the potential applicability of the nonstatutory labor exemption to individual dealers who had signed collective bargaining agreements. Pet. App. 21a. As

up, consumers were forced to "pay higher prices as a result of the hours restriction in the form of reduced convenience and service." Pet. App. 85a.

[6] The court of appeals agreed with the Commission that those factors distinguish the agreement in this case from the agreement involved in *Jewel Tea*. Pet. App. 20a.

to those dealers, the court found that the agency's findings were insufficient on the question whether "under these several separate collective bargaining agreements there was *bona fide* negotiation and effectual limitation of showroom hours." *Ibid.* Accordingly, while reiterating that "the dealer's *association*, the collective group of dealers, cannot properly claim the benefit of the nonstatutory exemption," the court remanded for the Commission to determine whether any individual dealers could claim "an exemption under the circumstances of bona fide collective bargaining with a union for shorter showroom hours or as a direct result of *union directed* violence and force for shorter showroom hours."[7] *Id.* at 23a.

Next, the court of appeals upheld the Commission's conclusion that the dealers' limitation of hours

[7] The court appeared to reason that an individual dealer could claim entitlement to the exemption if it could show that "direct negotiations and collective bargaining with salesperson employees or their representatives * * * actually brought about additional or different limits on showroom hours of operation"; therefore, the court found it "material for the FTC to consider whether separate dealer-union agreements existed with unions which 'contained bargained-for hours restrictions,' which were the product of genuine collective bargaining." Pet. App. 22a. Although the Commission found that no such agreements existed here, see *id.* at 60a-61a, 72a-73a, the court stated that the Commission's analysis was inadequate. *Id.* at 23a-24a. Other statements in the court's opinion, however, may suggest that the court believed that a dealer's adoption of shorter hours "under force and threats of vandalism, violence, picketing and property damage," *id.* at 23a, could show that "there was a restraint on hours of showroom operation imposed by a union rather than by the collective agreement with and among the other dealers or the association," and that this would bring the nonstatutory labor exemption into play. *Id.* at 24a.

constituted a violation of Section 5 of the FTC Act. Pet. App. 24a-31a. The court disagreed with the Commission's characterization of the dealers' reduction of hours as a limitation on output, and it stated that a Rule of Reason analysis rather than a per se approach should be employed in this case. Nevertheless, the court concurred with the Commission's view that "showroom hours may be an area of competition among the dealers," *id.* at 26a, and found that no efficiency justification existed to support the dealers' agreement. *Id.* at 29a-30a. The court further found that the Commission did not err in drawing an analogy to *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), to support the conclusion that, even absent a showing of actual price increase, the limitation on competition in showroom hours was an unreasonable restraint of trade. Pet. App. 26a-27a.

Finally, while the court affirmed the Commission's remedial order in most respects, it remanded in part. Expressing concern that the requirement that dealerships stay open for 64 hours per week for one year is "overly broad and intrusive on the manner of operation, and without a reasonable relation to the practices condemned," the court "suggest[ed]" that the Commission consider allowing dealers the option of opening for an average of ten-and-one-half hours each weekday, plus some minimum time on Saturdays, for the one year period. Pet. App. 32a. The court also suggested that the Commission reconsider whether 30 days would be sufficient for the dealers' trade associations to investigate and expel a member who violated the order by discussing showroom hours (even though petitioners had not challenged that provision). *Ibid.*

Judge Ryan concurred in part and dissented in part, stating that the Commission's "decision should be

affirmed in its entirety." Pet. App. 34a. Judge Ryan faulted the majority for failing to give proper deference to the Commission and for inadequately explaining its reasons for rejecting certain of the FTC's conclusions. *Ibid.* In particular, he objected to the limited remand to determine whether any individual dealers could assert the nonstatutory labor exemption. Judge Ryan noted that the Commission had already "considered, and rejected, the dealers' position on this factual issue." *Id.* at 35a. Because the FTC found that no bona fide, arm's length negotiations over hours had occurred, Judge Ryan concluded that there was no reason to give particular dealers "another chance on remand to litigate an issue already decided by the Commission and supported by evidence in the record." *Id.* at 37a.

Judge Ryan also believed that the FTC had correctly analyzed the antitrust issue. He disagreed with the majority that the Commission had employed the per se approach, and concluded that the Commission's limited consideration of efficiency justifications was more appropriate than the majority's application of a full-blown Rule of Reason inquiry. Judge Ryan further stated that the FTC's conclusion that the hours restriction was a restraint on the product market in the sale of automobiles was supported by common sense, economic theory, and "most importantly, the record." Pet. App. 37a-45a.

Finally, Judge Ryan disagreed with the majority's suggestion that the Commission reconsider certain portions of its order. He noted that the majority did not conclude that the order was legally erroneous, but simply believed that another approach might be preferable. In his view, the requirement that dealers remain open for 64 hours per week is reasonably related to the violation and within the Commission's

discretion, as is the provision that a dealers' association has 30 days in which to investigate a complaint. Accordingly, he would have enforced the Commission's order in full. Pet. App. 46a-49a.

ARGUMENT

1. Petitioners contend (Pet. 8-16) that the court of appeals erred in refusing to hold that the antitrust laws' nonstatutory labor exemption protects the dealers' agreement to reduce and standardize showroom hours. They assert that because the dealers entered into their agreement in response to demands by labor, the agreement is protected against antitrust liability. That contention is incorrect and does not warrant this Court's review.

a. By statute, both the existence of, and certain activities by, unions are exempt from the antitrust laws. See Clayton Act §§ 6, 20, 15 U.S.C. 17, 29 U.S.C. 52; Norris-LaGuardia Act, 29 U.S.C. 104, 105; *United States* v. *Hutcheson*, 312 U.S. 219 (1941). The statutory labor exemption does not extend to agreements between unions and nonlabor parties, however, or to agreements between employers. This Court has nevertheless recognized a nonstatutory labor exemption to the antitrust laws that protects certain limited agreements in which nonlabor parties participate. The exemption responds to the fact that if all agreements between unions and other parties were subject to the antitrust laws, the policy of federal labor law to promote negotiated agreements would be defeated. Accordingly, "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA [National Labor Relations Act] and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited

nonstatutory exemption from antitrust sanctions." *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975); see *United Mine Workers* v. *Pennington*, 381 U.S. 657, 664-665 (1965).

Petitioners seek to stretch the nonstatutory labor exemption to protect their agreement to limit showroom hours—an agreement that was not reached with employees, did not result from collective bargaining or negotiations, and was motivated not to further but to frustrate unionization of the employees. Pet. App. 68a. That contention finds no support in the purpose of the nonstatutory labor exemption or in this Court's cases. "The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell*, 421 U.S. at 622; see *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 689 (1965) (plurality opinion). That policy is inapplicable here. As the Commission found, petitioners "agreed among themselves, not with their employees" to restrain competition with respect to automobile showroom hours, and they did so "in order to *avoid* arm's-length negotiation." Pet. App. 73a-74a. Plainly, such an agreement among employers, divorced from negotiations with employees, does not further the national policy favoring collective bargaining and negotiated settlements. Nor has any decision of this Court applied the nonstatutory exemption to unilateral action by a group of employers, outside the context of collective bargaining or negotiations.[8]

[8] This case does not raise any issue regarding the applicability of the exemption to agreements among employers in multiemployer bargaining units. Petitioners never formed such a unit. Pet. App. 72a n.12, 193a-194a. Nor does it raise

Petitioners assert (Pet. 11-13) that because the labor laws give employees the right to engage in concerted action other than collective bargaining, the nonstatutory exemption should be extended to cover this case, in which petitioners supposedly "capitulat[ed]" to concerted demands by employees for shorter hours. The nonstatutory labor exemption, however, is not designed to promote employer alliances in labor disputes that are undertaken outside of a negotiating or collective bargaining setting. The exemption was developed to further the labor laws' preference for negotiated resolutions of labor disputes. See *Mackey* v. *National Football League*, 543 F.2d 606, 614 (8th Cir. 1976) (exemption requires, *inter alia*, an agreement that is "the product of bona fide arm's-length bargaining"), cert. dismissed, 434 U.S. 801 (1977). Here, petitioners turned their back on labor negotiations and instead agreed among themselves on a regime for altering showroom hours. Such joint action by employers is a far cry from the negotiated agreements that the labor laws envision as the means of reducing labor unrest and achieving labor stability. See 29 U.S.C. 151; *American Hosp. Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1541-1542 (1991) ("The central purpose of the [National Labor Relations] Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective- bargaining negotiations.").[9]

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any issue regarding the length of time that the exemption remains available to employers who maintain the provisions of a collective bargaining agreement after its expiration. See *Powell* v. *National Football League*, 930 F.2d 1293 (8th Cir. 1989), cert. denied, 111 S. Ct. 711 (1991).

[9] It is not sufficient for petitioners to claim that their agreement originated in a labor dispute and that it has no consequences that do not follow naturally from regulating

b. Contrary to petitioners' contention (Pet. 8), the decision in this case does not conflict with *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, *supra*. In that case, the Court considered the provision of a collective bargaining agreement between butchers' unions and Chicago retailers of fresh meat that prevented the sale of meat before 9:00 a.m. and after 6:00 p.m. The Court found that the hours restriction was protected against antitrust attack by the nonstatutory labor exemption. The plurality noted that the unions had engaged in "bona fide, arm's-length bargaining in pursuit of their own labor union policies," and concluded that the collectively bargained marketing-hours restriction was exempt in light of the district court's factual finding that the restriction furthered the butchers' interest in easing their workload and protecting their jurisdiction. 381 U.S. at 690, 692-697 (plurality opinion). The concurrence found the agreement valid not only on that basis, but also on the broader view that where mandatory subjects of negotiation are concerned, unions, not courts, are entitled to determine the practices that unions "have a legitimate interest in preserving and thus bargaining about." *Id.* at 726-729

working conditions. Pet. 13. If employers could respond to labor demands by agreeing among themselves on policies that standardize working conditions, it would immunize a wide range of anticompetitive practices from antitrust review without furthering any relevant labor law policy. Cf. *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U.S. 797, 810 (1945). Here, for example, the Commission found that the dealers that promoted the agreement "clearly recognized economic advantages in agreeing to reduce hours." Pet. App. 69a. Indeed, the agreement here restricted and standardized showroom hours themselves, rather than setting work requirements to be imposed on individual employees within business hours selected by the individual employers.

(Goldberg, J., concurring and dissenting). Thus, in finding that the agreement was protected by the nonstatutory labor exemption, both opinions in *Jewel Tea* emphasized that the agreement emerged from collective bargaining. In this case, the challenged agreement is one among employers, and was reached without any negotiations or collective bargaining with the employees or their representatives. *Jewel Tea* is therefore of no assistance to petitioners.

c. Petitioners also assert (Pet. 10) that the court's requirement of arm's length negotiations conflicts with the decisions in *Amalgamated Meat Cutters, Local Union No. 576* v. *Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979), and *Newspaper Drivers Local No. 372* v. *NLRB*, 404 F.2d 1159 (6th Cir. 1968), cert. denied, 395 U.S. 923 (1969). That claim lacks merit; as the court of appeals noted, this case presents an issue that "differs materially from the relatively few cases which have analyzed and considered [the nonstatutory labor] exemption in other factual contexts." Pet. App. 18a.

In *Wetterau*, after a retail store reached a bargaining impasse with the union, a wholesaler agreed to provide workers to replace the store's striking employees. The court held that, because federal labor law permits the replacement of striking employees to counteract the strike, the vertical agreement to loan employees had "no anticompetitive effect unrelated to the collective bargaining negotiations" and was protected by the nonstatutory labor exemption. 597 F.2d at 136. That holding does not conflict with the decision in this case, which involves an agreement among competitors that was reached without any negotiations and outside of a bargaining process. Even less relevant is *Newspaper Drivers*,

the holding of which addressed the unfair labor practice issues raised by a lockout by one newspaper after another newspaper was struck by a union that had made uniform demands on both.[10] See Pet. App. 67a n.8.

Petitioners suggest (Pet. 14-15) that, although formal bargaining did not take place, there were negotiations in this case in the sense of "adversarial give-and-take between labor and management." That factbound contention warrants no review here, but, in any event, the dealers' agreement was not a product of negotiations with labor. Rather, the agreement was imposed by petitioners to foil negotiations with the unions (as well as to suppress competition). As the Commission noted, petitioners adduced no evidence "that the agreement among the *dealers* resulted from activity that could fairly be characterized as arm's-length negotiation with their sales employees." Pet. App. 73a. While the court of appeals believed that the agreement was designed to obtain "labor peace," it agreed with the Commission that petitioners' agreement "was not * * * a direct product of employer collective bargaining, nor of arm's length dealing with salespersons." *Id.* at 21a.

Petitioners erroneously assert (Pet. 15-16) that the court of appeals gave undue deference to the FTC's legal analysis in finding the nonstatutory labor exception inapplicable to their agreement. The court

[10] In dictum, the court rejected the union's claim that the employers had conspired to violate the antitrust laws, implying that the newspapers had legitimately collaborated to advance their collective bargaining aims. 404 F.2d at 1163. But there, unlike here, the employers had ongoing bargaining relationships with a union. Moreover, any tension between this case and *Newspaper Drivers* would raise at most an intracircuit matter for the Sixth Circuit to resolve.

of appeals' statement that it would give "some deference," Pet. App. 18a, to the Commission's assessment of anticompetitive agreements accords with this Court's statement in *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986), that courts are to give "some measure of deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair.'" As to the application of the nonstatutory labor exemption on the facts of this case, the court's extensive discussion of the legal issues, its independent analysis of the facts, and its partial disagreement with the Commission's resolution of the case[11] all lend credence to its statement that it was applying "essentially de novo" review. Pet. App. 18a.

2. Petitioners contend (Pet. 17-20) that the court of appeals erred in upholding the FTC's determination that the dealers' agreement unreasonably restrained trade in violation of Section 5. In particular, they argue that the restriction of showroom hours constituted only an inconvenience to customers, not an injury to competition, and that it was justified by efficiencies in the form of reduced overhead.

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[11] The court of appeals remanded for the Commission to give additional consideration to the claim that certain individual dealers may have established their showroom hours, not as a result of the *dealers*' agreement, but as a result of independent collective bargaining agreements or perhaps as a result of union directed violence or threats. See note 7, *supra*, and accompanying text. The court's remand order is unjustified. Although we do not believe that that issue would independently warrant further review, we are filing a conditional cross-petition for a writ of certiorari so that, if the Court grants the petition here, it may consider all of the labor exemption issues in this case, including whether the court of appeals erred in ordering the remand.

The Commission found that the dealers, like other retailers, compete not only in the products they sell, but also in the services they provide, including their business hours. Pet. App. 77a. Relying on "common sense," "economic theory," and "the record," the Commission concluded that an agreement reducing showroom hours "disrupt[s] the market's price-setting mechanism," and, even if it does not raise prices, imposes costs in the form of more burdensome shopping opportunities that "are no less real or harmful to consumers than higher prices for goods and services."[12] *Id.* at 80a, 85a-86a. The court of appeals, albeit applying a somewhat different analysis, upheld the agency's finding that the dealers' agreement unreasonably restrained trade.[13] Pet. App. 24a-31a.

The Commission's finding that the dealers' restriction on hours is anticompetitive is in keeping with this Court's recognition that businesses compete on "all elements of a bargain—quality, service, safety, and durability—and not just immediate cost." *National Society of Professional Engineerss* v. *United*

[12] The Commission quoted at length from R. Bork, *The Antitrust Paradox* (1978), in support of its conclusion that "there is no economic difference between an agreement to limit shopping hours and an agreement to increase price." Pet. App. 78a-79a.

[13] The court of appeals mistakenly believed that the Commission had applied a per se approach to the dealers' agreement, and stated that a full-scale Rule of Reason analysis was warranted. In fact, the Commission's analysis concluded that since the dealers' agreement was inherently suspect, a complete Rule of Reason analysis would be appropriate only if there was a plausible efficiency justification for the agreement, which it did not find. Because the court of appeals upheld the Commission's ultimate determination on the antitrust issue, the disagreement in approach does not merit this Court's review.

States, 435 U.S. 679, 695 (1978). As the Commission found, this case is analogous to *Indiana Fed'n of Dentists*, in which the Court upheld the FTC's determination that a restriction on services unreasonably restrained trade. In that case, a group of dentists agreed not to supply X-rays to insurance companies who sought to use them in determining whether covered dental services were justified. In finding the dentists' agreement to be unreasonable, the Court explained that "[a] refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." 476 U.S. at 459. Here too, the dealers' refusal to compete in showroom hours prevents competition in a service that consumers desire and thereby impairs the functioning of the market. See Pet. App. 87a.[14]

[14] Petitioners suggest (Pet. 19) that the agreement in this case had no "plausible impact on price" and that a showing of concrete competitive injury was therefore required. The Court rejected the same argument in *Indiana Fed'n of Dentists*, 476 U.S. at 461-462 (agreement to restrict information on whether a service is cost-justified "may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services"). Petitioners argue that their restriction, unlike that in *Indiana Fed'n of Dentists*, has no "plausible impact on price," Pet. 19, but that claim is refuted by the dealers' express acknowledgment that the restriction on customers' ability to comparison shop for the best price had "improved * * * grosses." See note 3, *supra*; see also Pet. App. 131a-132a (quoting dealer statements that closing evenings "cuts down on shopping" and that when dealers closed on Saturday "grosses actually went up"). Likewise, the

In passing, petitioners assert (Pet. 19-20) that their agreement was justified by "efficiencies" because the shorter hours decreased the dealers' overhead. Petitioners did not press that claim before the Commission itself, and the efficiency justification that petitioners claim is not the type that this Court has found to justify an otherwise anticompetitive restraint. Cf. *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984); *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979). Moreover, as the Commission explained, Pet. App. 85a n.24, the decrease in overhead was solely attributable to reducing the service (showroom hours) that consumers desired. Accordingly, consumers would not benefit from that "efficiency" unless the price of cars dropped—a hypothesis that is at odds with petitioners' claim that their agreement had no "impact on prices." Pet. 17.

3. Finally, petitioners challenge (Pet. 20-25) the provisions of the Commission's order requiring that dealers keep showrooms open for a specific number of hours per week for one year; that dealers may not discuss showroom hours; and that the association petitioners must make transcripts of business meetings for five years.

Unless the Commission's remedy "has no reasonable relation to the unlawful practices found to exist" or constitutes an abuse of discretion, the remedy must be upheld. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 613 (1946); *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). In this case, none of petitioners' objections

suggestion (Pet. 18) that suburban car dealers could check the anticompetitive consequences of petitioners' agreement is no more persuasive than the claim rejected in *Indiana Fed'n of Dentists*, 476 U.S. at 460-461, that consumers could escape from the anticompetitive agreement in that case by commuting to neighboring communities for dental care.

justify denial of enforcement of the Commission's order.[15]

The Commission's order that the dealers maintain additional hours is a reasonable response to the finding that the dealers had unlawfully restricted showroom hours. It is settled that the Commission may compel affirmative conduct to eliminate the cause and consequence of illegal conduct. See, *e.g.*, *Simeon Management Corp.* v. *FTC*, 579 F.2d 1137, 1147 (9th Cir. 1978); *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 758-759 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978). The 64 hours-per-week figure falls in the middle of the range of automobile showroom hours maintained in other Midwestern cities. Pet. App. 95a. Likewise, the Commission's prohibition against discussion of hours and its requirement of transcripts of business meetings are reasonably designed to prevent and detect collusive reinstatement of unlawful limitations on showroom hours.

Contrary to petitioners' contention (Pet. 21), the preparation of transcripts is not unduly burdensome, given that such a written record would assist the Commission in detecting collusion in the establishment of hours. Compare *Hospital Corp. of America* v. *FTC*, 807 F.2d 1381, 1393 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987). Nor does the restriction on dealer discussion of showroom hours infringe the First Amendment (Pet. 21-22). The dealers' entry in the illegal agreement on hours justifies the future restriction. See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697-698

[15] The court of appeals did decline to enforce certain provisions of the order and remanded those issues to the Commission. In our view, that action was not justified, as we explain in our conditional cross-petition.

(1978) (injunction to remedy antitrust violation "may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent [a court] from remedying the antitrust violations"; upholding limitations on speech regarding the ethics of competitive bidding).

Petitioners also argue (Pet. 22) that the requirement of longer showroom hours is an abuse of discretion because in remedying "a minor inconvenience" to consumers, the Commission's order exposes the dealers to an unreasonable risk of harm from violence. The Commission did not "minimize the seriousness of the acts of intimidation appearing in the record," but concluded that its "order will make such coercive activity impractical and give dealers the safety of numbers."[16] Pet. App. 98a. Moreover, the Commission explained that to accept petitioners' rationale "would invite future investigative targets to police anticompetitive restraints with force in hopes that the Commission would shy away from striking down the restraint." *Ibid.* The court of appeals correctly upheld the Commission's judgment, and its holding does not merit further review.[17]

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[16] The Commission noted that its requirement that its order be distributed to employees may head off reprisals against the dealers by informing employees that "their employers are compelled by the Commission to expand hours." Pet. App. 103a.

[17] Nor is review warranted of petitioners' claim (Pet. 24-25) that the order violates the Norris-LaGuardia Act, 29 U.S.C. 104. That Act prohibits certain injunctions in a labor dispute that enjoin persons from refusing to engage in work. As the Commission explained, its requirement of longer hours for dealers is not equivalent to an order enjoining sales employees to cease refusing to work those hours. Pet. App. 98a n.40. The order here is directed to dealers, not their employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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